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AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 814

Case No. 918: MONTELEONE-GILFILLIAN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas, at the request of Beatriz Monteleone-Gilfillian, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application with the Tribunal until 30 April 1996;

Whereas, on 23 April 1996, the Applicant filed an application requesting the Tribunal, inter alia:

"(a) To rescind the decision of the Secretary-General rejecting the favourable recommendations of the Joint Appeals Board;

(b) To find and rule that the Secretary-General failed to respect the right of the Applicant to full and fair consideration for promotion and that, as a result of procedural irregularities and the injection of extraneous considerations, the Applicant was denied such full and fair consideration;

(c) To find and rule that the Applicant has been subjected to prejudicial and discriminatory treatment which entails the responsibility of the Respondent for the adverse effects upon her career and professional reputation;

(d) To find and rule that the Joint Appeals Board erred as a matter of law and equity in failing to review the totality of the Applicant's claims and in failing to provide appropriate and adequate compensation for the harm done to the Applicant for violation of her rights under the Staff Regulations and Rules;

(e) To order that the Applicant be given immediate consideration for promotion to the P-3 level with appropriate retroactive effect to April 1992;

(f) To award the Applicant appropriate and adequate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the Applicant to her career, reputation and psychological well-being as a result of the Respondent's actions or lack thereof;

(g) To fix, pursuant to article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at three years' net base pay in view of the special circumstances of the case; [and]

(h) To award the Applicant as costs, the sum of $5,000.00 in legal fees and $500.00 in expenses and disbursements."

Whereas the Respondent filed his answer on 7 January 1997;

Whereas the Applicant filed written observations on 22 May 1997;

Whereas, on 11 July 1997, the President of the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 1 July 1968, as a Clerk-Typist on a three month fixed-term appointment at the G-2, step III level. With effect from 29 October 1968, her appointment was converted to probationary and, on 1 February 1969, she was promoted to the G-3 level. After receiving a permanent appointment with effect from 1 July 1970, she received

promotions through the G-5 level, and, on 1 November 1977, became an Administrative Assistant. On 5 February 1979, she was given a special post allowance (SPA) to the P-2 level, as an Associate Recruitment Officer, serving in the United Nations Centre for Human Settlements in Nairobi, Kenya. On 1 January 1984, she returned to Headquarters and served as an Administrative Assistant at the G-5 level in the then Department of Technical Cooperation for Development (DTCD). On 1 September 1984, the Applicant was assigned from DTCD to the Kingston Office of the Special Representative of the Secretary-General for the Law of the Sea, as an Administrative Officer on an SPA to the P-2 level. On 1 June 1988, she was promoted from the General Service category to the Professional category at the P-2 level, with retroactive effect to 1 April 1979. The Applicant's performance during the periods 1 January-31 December 1986 and 1 January through 31 December 1987 was rated as "excellent".

On 2 August 1991, the Applicant wrote to the Secretary-General, requesting a meeting as she was "being discriminated against both by the Office of Personnel and the Law of the Sea". She attached her personnel record.

In a reply dated 9 September 1991, the Director, Office of the Secretary-General, acknowledged receipt of the Applicant's letter. After consultations with the Office of Human Resources (OHRM) and the Office for Ocean Affairs and the Law of the Sea, the Director advised the Applicant that:

> "[I]t seems that your request for the reclassification of your post to the P-3 level in 1988 could not be processed in view of the directive from the Office of Human Resources Management that no requests for higher classifications could be made unless there was a post available at the higher level. There was no P-3 post available at that time at the Kingston duty station, and this is still the case. In addition, your Office considers that the responsibilities of the post have not changed, and are not likely to change in the foreseeable future."

The Director, Office of the Secretary-General, suggested that the Applicant apply for suitable higher-level posts in other duty stations.

In December 1992, the Office for Ocean Affairs and Law of the Sea (OALOS) was transferred to the Office of Legal Affairs (OLA).

By memorandum dated 24 January 1993, to the Compensation and Classification Service (CCS), OHRM, through the Acting Administrative Officer, OLA, the Applicant transmitted a request, under staff regulation 2.1, for reclassification of her post of Associate Administrative Officer (P-2) "on the basis of the change in functions for this post as reflected in the ... job description which ha[d] been sent to [the Special Assistant to the Special Representative of the Secretary-General for the Law of the Sea] and to [him] in 1988."

On 1 March 1993, the Applicant transmitted her request for the reclassification of her post to the Chief of the CCS, stating that her "previous request dated 24 January 1993 had been forwarded by [the Applicant] through [her] Executive Office but [she understood] that [her] Executive Office ha[d] not yet acted on it." She indicated that, although her department had agreed to proceed with a request for reclassification of her post in 1988, no request had been forwarded to his office.

In a memorandum dated 3 March 1993, to the Chairperson, Appointment and Promotion Committee (APC), the Applicant stated that, although she had not been recommended for promotion by her Department, she "believe[d] the Committee should give fair consideration to adding [her] name to the P-3 promotion register." She advised the Chairperson of the APC that (a) she had been at the P-2 level for almost 14 years and (b) her Department had failed both to transmit her 1988 request for reclassification of her post to the CCS and to provide her with timely performance evaluation reports (PERs).

By memorandum dated 12 July 1993, the Officer-in-Charge, CCS, informed the Applicant that "th[e] [CCS] ha[d] reviewed the duties and responsibilities of [the Applicant's] post as stated in Section A of the job description submitted", and that such job description was still current. He added that, "[e]ven if [OLA] would endorse [her] request for reclassification, the changes in the functions would not be substantive to a degree that a reclassification of the post would be justified." He advised that, "[n]otwithstanding the fact that there ha[d] not been any changes in function which would preclude issuance of a new classification notice, the post ha[d] been rated again, showing that the functions [were] appropriately classified at the P-2 level."

On 9 August 1993, the Applicant submitted to the Chairperson, APC, a recourse for promotion to the P-3 level, pursuant to ST/IC/1993/37 of 9 July 1993.

On 30 August 1993, the Panel on Discrimination and Other Grievances (the Panel on Discrimination) adopted its report on the investigation of the Applicant's December 1992 allegations of discriminatory treatment regarding the classification of her post. Its conclusions and recommendations read, in part, as follows:

> "...
>
> At the very least, there is a pattern of benign neglect on the part of the administrators of [the Applicant's] department with reference to [the Applicant's] legitimate expectations for timely performance evaluations and appropriate opportunities for career development. The fact that the current administration has no record of why this situation occurred is not a valid excuse for not rectifying it.
>
> Therefore the Panel recommends:
>
> a. The department immediately process the proper forms which will bring [the Applicant]'s performance record up-to-date;

> b. That an audit be done of [the Applicant]'s functions and, if it is still classified at the P-2 level, she should be given priority consideration for all P-3 posts within the department. If the post is classified at the P-3 level, her promotion to that level should be retroactive to the date she first submitted her new job description."

In this respect, the Panel on Discrimination noted that the Applicant had not received a performance evaluation since 1988, the year she had been officially promoted to the Professional category, and had requested that her post be upgraded.

On 29 September 1993, the Applicant appealed to the Chairperson, Classification Appeals and Review Committee, the decision to confirm the classification of her post at the P-2 level.

On 3 December 1993, the Vice-Chairperson, APC, advised the Applicant that "notwithstanding the additional information [she had submitted], the re-examination of [her] case by the Appointment and Promotion bodies did not reveal that there were sufficient grounds to amend its previous decision."

By memorandum dated 15 August 1994, to the Coordinator of the Panel on Discrimination, the Assistant Secretary-General, OHRM, advised that the revised job description prepared by the Applicant in 1988 "basically describe[d] the same responsibilities as [were] depicted in the original job description". The post had been re-evaluated and the Applicant had been informed that it would still be classified at the P-2 level. In addition, he noted that, on information from the Executive Officer, OLA, "OALOS would soon be restructured, and that pending the restructuring any classifications in OALOS were on hold." Agreeing that the Applicant should receive a PER for the period 1988 to the present, he requested the department to initiate the process. The Applicant signed the PER for this period, which gave her an overall rating of "a very good performance".

On 4 November 1994, the Applicant lodged an appeal with the Joint Appeals Board (JAB) against the Administration's decision not to recommend her inclusion on the 1992 P-3 Promotion Register.

On 30 June 1995, the Executive Officer, OLA, wrote to the Applicant, informing her that her post was to be abolished with effect from 1 October 1995 and that her permanent appointment would be terminated as of 30 September 1995.

On 5 July 1995, the Applicant wrote to the Secretary-General requesting a review of the administrative decision to terminate her permanent appointment.

The JAB adopted its report on 25 August 1995. Its considerations, conclusion and recommendations read as follows:

> "23. The Panel first noted that a staff member has no right to be promoted. There is, however, a right to be given due consideration for promotion, in accordance with the Regulations and Staff Rules.
>
> 24. The Panel, after carefully considering the evidence, found that the absence of a PER for the Appellant at the time [that] promotion was considered was of critical importance in this context. The Panel noted that the Appellant had no PER for a long time, and had finally received a PER covering the period 1 January 1988 to 30 April 1995. The long delay in providing the staff member with her PER was a violation of the rules. The Panel found that the PER was of little use and value because of the long delay in preparing it, and because of the length of the period covered.
>
> 25. It was not for the Administration to determine that the lack of a PER did not have any influence on the APP [Appointment and Promotion Panel]'s decision not to recommend the promotion of the Appellant. A staff member's PER is considered a vital element in the promotion process. It is impossible for a staff member to receive due consideration, if one of the essential documents in determining a staff member's qualification is missing. The Panel found that whatever the thinking of the Appellant's department was, there was no reason for the department not to give her a PER. The Panel concluded that the absence of the Appellant's PER was a denial of the Appellant's right of due process.

26. The Panel found the Administration's contention that the long delay in the PER was 'an unfortunate administrative oversight', and that because such a delay was 'not limited to the [A]ppellant's situation, it [could] hardly be cited as discrimination' to be unconvincing.

27. On the other hand, the Panel noted that the Appellant had not applied for any higher posts and that although the Appellant was not required to do so, she may thereby have missed opportunities for promotion.

28. The Panel concluded that although the Appellant had been at the same level for 14 years, that fact of itself was not convincing evidence of discrimination."

Recommendations

29. In light of the above, the Panel recommends that the Appellant be given due consideration for vacancies for which she is qualified and provided she applies.

30. In addition, the Panel unanimously recommends that the Appellant be given three months' net base salary as compensation for the violation of her right to due process, by the Administration's failure to provide her PERs in respect of her service, as and when required by the Staff Rules."

On 6 October 1995, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB's report and informed her as follows:

"The Secretary-General has examined your case in the light of the Board's report. He has noted the Board's finding that there was no convincing evidence of discrimination. It also found that your right to due process was violated in the handling of your performance evaluation report and in consideration thereof recommends that you be paid three months' net base salary. The Secretary-General wishes to recall that promotion is within the Secretary-General's discretion and that, while there were some procedural irregularities in your case, there is no basis to conclude that, had such irregularity not taken place, you would have been promoted. Moreover, there is no evidence of quantifiable damage warranting the Board's recommendation for payment of three months' net base salary. The Secretary-General wishes to express his regret that excessive delay and

> irregularities occurred in your case and he has decided that you be paid compensation in the amount of $1,000 (one thousand) dollars. He has also decided, in accordance with the Board's recommendation in paragraph 29 of the report, that you be given due consideration for vacancies for which you are found to be qualified and provided you apply."

On 23 April 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Administration improperly refused the Applicant's request for reclassification of her post, thereby denying the Applicant due process.

2. The Applicant was not given full and fair consideration for promotion, as evidenced by the fact that she had 14 years of excellent service with the Organization and yet was not promoted above her entry-level post.

3. The decision not to select the Applicant for promotion was motivated by prejudice or other extraneous factors.

Whereas the Respondent's principal contentions are:

1. The plea that the Administration improperly refused to submit a request for reclassification of the Applicant's post is not properly before the Tribunal.

2. A staff member does not have a right to promotion but only to consideration for promotion. The Applicant was properly considered for promotion.

3. The decision not to select the Applicant for promotion was not motivated by prejudice or other extraneous factors.

The Tribunal, having deliberated from 9 to 25 July 1997, now pronounces the following judgement:

I. The Applicant was promoted to the P-2 level in 1988, with retroactive effect from 1979. Subsequent to her promotion in 1988, the Applicant commenced to take the necessary steps for the reclassification of her post to the P-3 level, in the belief that her department, the Office of the Law of the Sea, had supported this reclassification. The Applicant's initial request for reclassification in 1988 now results in this appeal to the Tribunal nearly eight years later.

II. The Applicant also appeals an administrative decision by the Secretary-General, upon the recommendation of the Appointment and Promotion Committee, not to include the Applicant's name in the 1992 P-3 Promotion Register. The Applicant claims that the promotion review process was tainted by procedural irregularities and lack of due process. She asserts that the denial of her request for promotion was the culmination of a long pattern of discrimination based on her status as a female staff member, who was not a lawyer, in a small, local, legal office, and the animosity against her resulting from an earlier dispute with the Respondent for her initial promotion to the P-2 level.

III. Before addressing the merits of the Applicant's case, the Tribunal first considers the Respondent's contention that the issue of reclassification is not properly before the Tribunal. The Applicant, in her observations on the Respondent's answer, agrees that the issue before the Tribunal is whether she was wrongfully denied fair consideration for promotion. There is no dispute that the issue of due process is properly before the Tribunal. However, the Applicant further claims that the allegation of longstanding discriminatory treatment is also properly before the Tribunal. It appears to the Tribunal that the Respondent mischaracterizes the nature of the Applicant's claims. The Applicant is not appealing, per se, the denial of reclassification to the P-3 level. Rather,

the Applicant is alleging that the decision to deny her promotion was the culmination of a pattern of discrimination and prejudice. The Applicant placed this issue before the Joint Appeals Board (JAB), and thus may appeal the issue before the Tribunal. That this claim implicates the circumstances surrounding the Applicant's request for reclassification prior to her request for promotion cannot mean that the claim does not also arise from the Secretary-General's denial of promotion. Therefore, both the due process claim and the discrimination claim properly arise from the administrative decision at issue in this case.

IV. The principal procedural irregularity cited by the Applicant, is the Respondent's failure to conduct performance evaluations in accordance with established procedures. The Applicant did not receive a performance evaluation report (PER) from 1988 until 1995. Prior to 1988, she had consistently received PER ratings of "excellent" and "very good". However, at the time of her request for promotion review in 1993, there was a four year gap in her performance record, due to the Respondent's failure to follow his own performance review procedures.

The JAB found, and the Tribunal concurs, that the absence of a current PER "was of critical importance" in the context of a promotion review and that the "long delay in providing the staff member with her PER was a violation of the rules." The Tribunal also agrees with the JAB's conclusion that the absence of an updated PER was a violation of due process. The Tribunal has previously concluded that when a denial of promotion is based on incomplete and inaccurate information, "the Applicant's right to full and fair consideration for promotion [is] not adequately respected". (Cf. Judgements No. 592, Sue-Ting-Len (1993), and No. 586, Atefat (1992)).

V. The Tribunal need not determine whether the Applicant would actually have received a promotion had her performance record been complete. It is sufficient for the Tribunal to find that the appropriate procedures were not followed in the Applicant's promotion review. This itself constitutes a violation of the Applicant's due process rights.

VI. The Tribunal further notes that the Panel on Discrimination and Other Grievances (the Panel on Discrimination) had recommended to the Respondent, in August 1993, that he update her performance records. The Respondent failed to provide an updated performance report until August 1995, almost two years after the Panel's recommendation and more than six years after her last PER. The Tribunal finds that this delay constitutes a serious violation of due process. The Tribunal has previously held that:

> "[i]f the Panel on Discrimination is to continue to serve the valuable purposes for which it was established and to carry out its mission effectively, it is essential, ..., that the Respondent react with reasonable promptness to the Panel of Discrimination reports regardless of whether it agrees or disagrees with them." (See Judgement No. 507, Fayache (1991), para. XVII).

In this instance, the Respondent's delay of one year in responding to the Panel's report, and his further twelve month delay in meeting the Panel's recommendation had the effect of undermining the Panel's work and purpose. It also unnecessarily jeopardized the Applicant's chances of receiving a promotion. This was a clear violation of the procedures established by the Respondent and a violation of the Applicant's right to fair treatment.

VII. The Tribunal next examined the Applicant's claim that she had been the victim of a longstanding pattern of discriminatory and prejudicial treatment. While the decision of the Compensation and

Classification Service (CCS) denying the Applicant reclassification to the P-3 level is not itself before the Tribunal, the process leading up to that decision is probative of the Applicant's discrimination claim. The Tribunal notes that the Applicant's attempt, since 1988, to receive adequate redress for her request for reclassification to the P-3 level had been rebuffed by refusal and inaction. Her initial submission in 1988 of a new job description at the request of her supervisors was never acted upon, thereby denying her an opportunity for review of the reclassification of her post. In 1992, the Applicant again attempted to obtain such a review once the Office of the Law of the Sea had been transferred to the Office of Legal Affairs (OLA). The OLA refused to complete the form, again denying the Applicant a formal review of her request. Under pressure from the Applicant, the OLA sought, instead, an informal review of the request. Ultimately, the CCS denied the Applicant's request for reclassification. When the Applicant appealed this denial to the Classification Appeals and Review Committee, she received no response. Her appeal was never heard.

VIII. The Tribunal finds that the delay and inaction were inappropriate and contributed to the Applicant's belief that she was being discriminated against because of her status as a female who was not a lawyer. The Applicant was also under the impression that the Respondent was retaliating against her for her earlier dispute over her promotion to the P-2 level. In the view of the Tribunal, all staff members are entitled to be dealt with in good faith and in a manner that is fair. Failure to abide by established procedures gives rise to dissatisfaction and low morale and threatens the integrity of the entire Organization. It also leads to unnecessary and costly litigation. The Tribunal believes that the Applicant's request for reclassification was not dealt with efficiently, promptly or in good faith. As a result, the Applicant's claim has

been unnecessarily prolonged for eight years and a good staff member has been given the impression of wrong-doing by the Organization.

IX. However, despite the Tribunal's finding that the Respondent's conduct in this case was egregious, the Tribunal agrees with the JAB that there is no evidence of a pattern of discrimination. In August 1993, the Panel on Discrimination described the Respondent's treatment of the Applicant as "benign neglect". Two years later the JAB concluded that there was no convincing evidence of discrimination. In the Tribunal's view, nothing has changed to modify this conclusion. The Tribunal noted in a previous case that:

> "... There is a vast difference between cases of [discrimination] and cases in which supervisors simply do not share a staff member's evaluation of his own qualifications, performance or merit, or in which there is disharmony between supervisors and a staff member for a variety of reasons having nothing at all to do with unlawful discriminatory attitudes." (Cf. Judgement No. 507, Fayache (1991), para. XVIII).

In the present case, the Respondent should have dealt more effectively with the Applicant's request for reclassification. The Tribunal, however, cannot find that the underlying motivation for the Respondent's conduct was discrimination on the basis of gender or retaliation. The evidence submitted regarding the abolition of the Applicant's post and the different treatment she was receiving in comparison to several of her colleagues, do not change the Tribunal's conclusion with respect to the allegations of discrimination.

X. Based on the foregoing, the Tribunal concludes that the Applicant is entitled to compensation for the violations of due process, but not for discriminatory treatment. The Respondent's failure to update the Applicant's performance record until 1995 and the unreasonable delay in responding to the Panel on

Discrimination's report jeopardized the Applicant's career advancement and violated her right to full and fair consideration for promotion.

XI. The Tribunal cannot concur with the Respondent that $1,000 is sufficient to compensate for these serious deficiencies in due process. It finds no reason why the Secretary-General substituted its judgement for that of the JAB in this regard. The Tribunal concludes that the Applicant is entitled to compensation. The Tribunal assesses this compensation to be the equivalent of nine months of the Applicant's net base salary at the rate in effect on the date of the communication of this judgement.

XII. For the foregoing reasons,

(a) The Tribunal orders the Respondent to pay to the Applicant nine months of her net base salary at the rate in effect on the date of the communication of this judgement;

(b) The Tribunal also affirms the JAB's recommendation that the Applicant should receive full and fair consideration for all vacancies for which she applies and for which she is qualified;

(c) The Tribunal rejects all other pleas, including the Applicant's request for costs.

(Signatures)

Samar SEN
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

Geneva, 25 July 1997

R. Maria VICIEN-MILBURN
Executive Secretary